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Motion—Remedy for Breach of Contract and Torts.

The act approved February 27th, 1914, extending the right to proceed by motion for judgment in cases upon tort as well as contract, has attracted little attention amongst the profession. There are some features in it, of course, very radical, and we imagine that its use, especially in cases of tort will be somewhat limited until one or more cases have been before our Supreme Court. We have heard some discussion as to the nature and form of the notice in cases of tort, but see no reason why that should give rise to much trouble. The notice is expected to be informal; it is supposed to be drawn by the party himself and not by a skilled attorney; and yet in the case of Security Loan & Trust Co. *v.* Fields, 110 Va. 827, the Court holds that whilst viewed with great indulgence by the courts the plaintiff is obliged to set out in his notice matter sufficient to maintain his action. It behooves the draughtsman, therefore, to see to it that in cases of tort all the essentials should be set out—informally, it is true, and in plain, simple language. He should recall Hortensein's case, 102 Va. 914, and remember that "duty" is not only the sublimest word in our language (as General Lee did *not* say) but that it is one whose definition is essential in all tort cases arising out of the relations between carriers either of goods or passengers. We believe the only safe rule is to model the notice, in cases arising out of tort, upon a good declaration, and follow the material parts of such a declaration, drawing the paper, however, in the same plain, straightforward way in which a bill in chancery ought to be drawn.

One feature of the Act of 1914 is worthy of attention and we think ought to be amended so as to correspond with the law as it was in section 3211, Pollard's Code. Under the law as it then

stood the notice had no advantage over the ordinary common-law action as to the forum in which it was brought. It could only issue against defendants, one or more of whom resided in the county wherein the action was brought, section 3215 being expressly excepted from its operations. As it now stands, if a merchant in Lee county buys a bill of goods of a merchant in Norfolk, or gives a note to a bank in the county of Accomac, he can be sued either in Norfolk or Accomac, as the case may be—if the proceeding is by notice and motion; whereas, if an action of assumpsit or debt is brought it could only be brought in Lee county. This difference ought not to exist. Either section 3215 should be repealed, or the act of 1914 made to conform to the restrictions of section 3211. For despite the broad provisions of section 3215, it is so limited by section 3220 that it practically makes it impossible to bring an action against a defendant in any other county or city than that in which he or a codefendant resides—excepting of course railroad, express, canal, navigation, turnpike, telegraph or telephone companies.

There is no reason whatever that this jurisdictional difference should exist between a proceeding by notice and motion and a common-law action, and our next General Assembly should make the two remedies conform in this respect.

Evidence of Similar Acts.

The papers have been very full lately with the case of the Englishman named Smith who seems to have had the misfortune (though from his standpoint it might have been called good fortune) to lose several wives whose deaths were nearly always in bathtubs, the prisoner in every instance profiting from a pecuniary standpoint by the death of his wife. The last bath of his last wife proved fatal to him, and he was hung last month in the city of London.

One of the difficulties which came up in the case was as to the propriety of admitting evidence to show the manner of the deaths of his former wives, and Mr. Justice Scrutton admitted the testimony, which in our judgment would have been sustained in the State of Virginia. As far back as Trogdon *v.* Commonwealth, 31 Gratt. 862, our Supreme Court of Appeals has held that whenever

the intent or guilty knowledge of a party charged with crime is a material ingredient in the issue of a case, other acts and declarations of a similar character tending to establish such intent or knowledge are proper evidence to be admitted, provided they are not too remotely connected with the offence charged, and what are the limits as to the time and circumstance is for the Court in its discretion to determine. And in Piedmont Bank *v.* Hatcher, 94 Va. 231, the Court citing the last named case approved the general rule, especially where the transactions are of similar nature, executed by the same parties and closely connected in point of time. The Court in this latter case held that large latitude is always given in cases of fraud.

In England in the case of Rex *v.* Bond, 1906 2 K. B., page 414, Mr. Justice Bray laid down the principle in an admirable judgment, which seems to us to apply to all cases of crime and to extend the same latitude to all cases which our own Supreme Court has extended to fraud. Mr. Justice Bray's decision in this case was approved by the House of Lords in Rex *v.* Ball, 1911, A. C. 57. The theory upon which previous similar acts by the prisoner to that of which he is accused seems now to be admissible, is confined to three classes of cases: 1st—To prove the system of conduct on his part; 2nd—To rebut a defence based on mistake or accident; and 3rd—To prove guilty knowledge of some relevant fact on the part of the accused. In each of these cases the specific acts relied on to prove an offence are capable either of an innocent or of a sinister interpretation, and, in order to discover which interpretation is right, similar instances in the prisoner's history are relevant, both in logic and in law.

Provocation an Excuse for Murder.

The "unwritten law" has very little standing in the English courts. The fact is, it has no standing at all, and in England a man who commits murder is very apt to get his just deserts, no matter how much he may claim that he was justified by the improper conduct of his victim, whether she be his wife or one that he claims to have the right to kill for what our newspapers are pleased to call "statutory grounds" for divorce. In Rex *v.* Hayward, 6 C. & P. 157, the English court

has held that if a homicide takes place in cold blood the offence is murder, no matter what is the provocation. Even where the provocation consists of a wife's infidelity, the court has held that it may reduce to manslaughter the killing of the woman, but cannot have that effect on the murder of a third person. At least that is the view that the Court of Criminal Appeal took in Rex *v.* Simpson, decided last July. The prisoner, a soldier returning on furlough, found that his wife was drinking heavily, neglecting their only child, two years old, who was suffering from a painful disease, and, according to the medical evidence, might have died at any time. The prisoner also found clear evidences of his wife's infidelity, and, overcome with the thought that he must leave this poor little diseased child behind him on his return to the army, to be neglected and possibly suffer beyond all human aid, the prisoner cut the child's throat with a razor. For his defence he set up the foregoing facts and there was no question but that he was absolutely sincere in his plea. The court held, however, that he was guilty of murder in the first degree, but the judge, the jury and the Court of Criminal Appeal all recommended the prisoner to the exercise of the Royal prerogative. In Rex *v.* Lynch, 5 C. & P. 324, the English court had held that a sudden provocation of a gross kind destroys the self-control of the person provoked, creates a kind of sudden frenzy, and so prevents the *mens rea* having that deliberate character which is the attribute of criminal intent to murder. Upon this ground it is hard to understand the difference between killing the provoker or an innocent third party when a man is in a sudden frenzy, but we think that the method adopted by the English courts much the best—to uphold the law and then ask that its severity may be modified by the exercise of the Royal prerogative.

"Guilty, but Insane."

In an editorial in the April Number, 1915, of Volume 20 of the Virginia Law Register, page 947, we commented upon the legal incapacity of a felon to profit by his felonious act, and the effect of a murder by the heir upon his inheritance from the murdered man. A new phase of this much discussed question has just arisen and been decided by the House of Lords in Rex *v.* Felstead

(1914), which happens to be one of of the few cases in which a decision from the Court of Criminal Appeal can be carried to the House of Lords. The point in question was so important that the Attorney General requested and obtained leave to have the appeal heard. The question was whether a criminal lunatic who had killed his father could benefit under the latter's intestacy. Felstead had murdered his father and his brother. He was found "guilty, but insane" and ordered to be detained during his Majesty's pleasure. The authorities are overwhelming, as we have shown in the editorial we mentioned, that a murderer can not benefit from the death of his victim, and it is equally well settled that the verdict of a criminal court will be accepted in a civil court as prima facie evidence of the crime. Now the question in Felstead's case was that the prisoner had been found guilty. The Court of Criminal Appeal held that the verdict of the jury finding the prisoner guilty established his guilt and that, therefore, under the well settled principles of law he could not inherit. The House of Lords, however, overruled this view and declared that a verdict of "guilty, but insane" amounted to an acquittal. The effect of course of this decision removed from Felstead the taint of murdering his father, and in England henceforth, one who murders a person from whom he inherits does not lose his inheritance by the murder, when the verdict is "guilty, but insane."

A rather curious result is reached by this decision: If, as the House of Lords holds, a verdict of "guilty, but insane" is equivalent to an acquittal, the prisoner can not appeal, as there is no appeal against an acquittal.

A Most Remarkable Procedure.

We are never surprised at anything which takes place in a New York court. Their methods of procedure are almost as foreign to our old-fashioned ideas as if they took place in China. But we might say that the procedure in the case of the State *v.* Albert Freeman was the most startling we have ever known, and we are not surprised that the United States Circuit Court of Appeals promptly reversed the lower court.

Freeman was indicted along with Julian Hawthorne and one

Morton for using the mails in operation of a conspiracy and plan to defraud investors in some mining stocks. Hawthorne and Morton got one year each and have served out their term. Freeman got five years, but appealed. The ground of his appeal was that his trial was presided over by two different judges, one of whom only heard a part of the case.

It is true Freeman by counsel assented to this shifting of judges.

The first judge was Charles M. Hough, who heard part of the case, was taken ill, and it was then agreed that the case might go on and be finished before Judge Julian M. Mayer.

After the conviction of all of the defendants, Hawthorne and Morton accepted their sentences and, as we have said, served out their terms of imprisonment. Freeman, however, excepted to various irregularities in the trial, the main exception being to the "swapping" of judges. The United States Circuit Court of Appeals for New York—Judge Ward in part dissenting—held that the lower court erred in not setting aside the verdict and granting a new trial. Judge Rogers, who delivered the opinion of the court, said in part as follows:

> "An examination of the cases in the English courts discloses no warrant for believing that such a substitution of judges as took place in the trial of this defendant would be sustained in that country without a trial de novo. The courts of England jealously guard the life and liberty of the subject and deny to one accused of crime the power to waive the rights which the law secures to persons so situated, and which are given not alone for their protection, but in the public interest.
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> "It is not questioned that it is the duty of a trial judge to be present during all the stages of a criminal trial. His absence during the examination of a witness, during the argument of counsel, or at the handing in of a verdict has been held to constitute reversible error, and where a statute required the presence of two or more judges at the trial it has been held that the absence of one of them when the verdict was received invalidated the verdict.
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> "In the case at bar a judge was present at all the stages of trial of the defendant, but the judge thus attendant was not the same throughout the trial. Can one judge hear the witnesses for the state and another judge, by consent, hear the witnesses for the defense? And can a judge who has not

seen and heard all the witnesses seen and heard by the jury, charge the jury and receive the verdict and impose sentence if the accused has consented to his substitution in place of a judge who began the trial, but has been compelled by illness to retire?

"In the case at bar, the substituted judge came into the trial after the government had presented the whole of its case. There were 106 witnesses who testified for the government and the substituted judge knew nothing of these witnesses except as he read their testimony in the stenographie minutes. A trial judge should have before him all the evidence that is before the jury, and he does not have it all before him if the jury has seen and heard the witnesses give their testimony upon the stand while he has only read it as recorded in the minutes. Witnesses seen and heard by the jury must be seen and heard by the judge.

"From the personal appearance of witnesses upon the stand the jury obtained, and the judge did not, what Professor Wigmore calls 'the elusive and uncommunicable evidence of a witness.' The demeanor of a witness on the stand may be as important as any other evidence in the case. The record of this case affords more than one instance where the judge frankly stated his embarrassment due to the fact that he had not heard and seen all the witnesses, and so was unable to rule and to instruct the jury as otherwise he might have done.

"One of the several instances of this sort is seen in the following statement made in the course of his charge to the jury: 'Now, I do not propose to comment upon the testimony of individual human beings in this case, and under the circumstances it would be a piece of judicial impertinence, because you have seen all the witnesses and I have only seen some of them.'

"It is the opinion of this court that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end.

"It is not possible for either the government or the accused, or for both, to consent to a substitution either of one judge for another judge or of one juror for another juror. The continuous presence of the same judge and jury is equally essential throughout the whole of the trial. The conclusion which we have reached makes unnecessary the consideration of other assignments of error. Judge Ward, not otherwise dissenting, thinks the motion to dismiss the writ of error should be granted. Judgment is reversed and a new trial is ordered."

We cannot imagine a graver fault in the administration of justice than this remarkable conduct, and here in Virginia we do not believe any of our *nisi prius* judges—State or Federal—would for one moment have consented to sit in a similar case, no matter what stipulation had been entered into by counsel. For a judge would not wish to sit in a case in which he had not heard all of the evidence, nor do we see how he could consent to allow himself to be put in such a position.

Of course, as is well known to Virginia lawyers, the accused in this State can not waive any one of the safeguards thrown around him by our Constitution, Bill of Rights and Laws.

The Frank verdict would have been set aside in this State, as the prisoner must be personally present in Court at every stage of the case, according to our decisions.

The Freeman case could not have occurred with us and ought never to have occurred anywhere else.

The Webb-Kenyon Act—State Regulation of the Transportation of Intoxicating Liquors.

The Webb-Kenyon Act, which was before our own Supreme Court of Appeals in the case of Taylor *v.* Commonwealth, decided June 10, 1915, was before the Supreme Court of the United States in the case of Adams Express Co. *v.* Commonwealth of Kentucky, the opinion being handed down four days after our own court handed down its opinion. The Supreme Court of the United States holds that shipments into a state of intoxicating liquors, which, because intended solely for the personal use of the consignees, were not to be used in violation of the laws of the state as construed by its highest court, were not subject to a law of such state forbidding carriers to bring intoxicating liquors into, or deliver them in, any dry territory, by the provisions of the Webb-Kenyon Act prohibiting the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the State into which liquor is transported. The Supreme Court practically

holds that the use of intoxicating liquor by the person who buys it is not a violation of law, an opinion which may appear very startling to some of our prohibition friends who hold that to take a drink is little less criminal than murder, but nevertheless common sense must hold in the language of the court that "the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society." It is rather refreshing in these days of attempts to regulate private conduct of the individual by legislation to find as clear-cut definition of the rights of the individual sustained by the highest tribunal in the United States. and whilst we would not be at all surprised to see legislation prohibiting taking a drink, smoking a cigarette, or wearing short skirts, we do not think that any of these salutary, useful and wise principles of law, in the view of some people, will ever be enforced by the courts.

Is Somnambulism Insanity or Its Equivalent?

While speaking of the defense of insanity, a curious phase of the question arose in the prosecution of a man named Zimmerman, at the London Court of Sessions, during the past summer. Zimmerman, although a British-born subject, was the son of a German, who had been naturalized for over forty years. He was found trespassing on the Brighton Railroad line, at a place forbidden under the Defense of Realm Act, although there was no charge of any other nature against him. Zimmerman claimed that he was a sleep walker and that it was a disease, if it may be called a disease, and was so common in his family that two brothers and a sister were addicted to the same habit and kept bells on the outside of their bedroom doors to wake them up if they attempted to walk out of their room in their sleep, and that he was walking in his sleep at the time he attempted the offense with which he is

charged. He introduced medical testimony to prove the fact that he was a somnambulist and the Court of Quarter Sessions quashed the conviction in the lower court. The question is, whether somnambulism can be held to be a form of insanity. Sir James Fitz-James Stephen in his General View of the Criminal Law of England (Ed. 1863, p. 78) held that to constitute a crime there must be six ingredients, (1) occurrence to the mind of the contemplated action as a possibility, (2) deliberation, (3) resolution, (4) intention, (5) will, and (6) execution by a set of bodily motions coördinated towards the object intended. This is probably a little too deep for the ordinary mind and has been criticised by psychologists. But there is no question that Stephen is right in the fact that it takes both intention and will concurring to constitute a criminal intent. Will may exist without an intention, and, as Sir James points out, a new-born child moves its hands or arms and lays hold of anything between its fingers. These motions are voluntary, and therefore possibly somnambulism and other movements during sleep are of the same kind. They are voluntary but as they are not coordinated with a view to any definite result they are not accompanied by any intention. One walking in his sleep certainly can not be charged with an intention, because the mind is absolutely unable to act intelligently, and we do not think there is any question but what the Court of Quarter Sessions was absolutely right in quashing the conviction of Zimmerman.

Damages Under the Federal Employers' Liability Act—Conscious Suffering.

In the August number of the REGISTER, p. 305, we commented on the decision of the St. Louis and Iron Mountain Railway Company v. Craft, in regard to the allowance of damages to a decedent's next of kin on account of the conscious pain and suffering as a result of the injuries to the decedent which took place between the injury and his death. We expressed some doubt in regard to the ambiguity in the headnotes, but the court, in the case of Kansas City Southern Ry. Co. v. Leslie, affirmed the decision in the St. Louis and Iron

Mountain Railway Co. *v.* Craft, and holds that the conscious pain and suffering endured by the deceased in the brief period—less than two hours—between his injury and death entitled the widow and child to additional damages and that they could recover in one suit for both. The objection was made in this case that the declaration set up two distinct and independent liabilities springing from one wrong, but based upon different principles, and that the jury should have been directed to specify in their verdict the amount awarded, if any, in respect to each, but the Supreme Court held that there was nothing in this point overruling the objection and said:

> "Of course in cases arising under this statute trial courts should point out applicable principles with painstaking care and diligently exercise their full powers to prevent unjust results; but its language does not expressly require the jury to report what was assessed by them on account of each distinct liability, and, in view of the prevailing contrary practice in similar proceedings, we can not say that a provision to that effect is necessarily implied."